O. Irrig./43

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Subject:—

Opinions Under the

Bombay Irrigation Act

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RHB.
7.7.

1/HJ
2/8

NWP
2/8

Submitted.

The facts are these:-

Mr. Karimbhai Abdul Hussein, a licensed plumber of the Bombay Municipality and of the P.W.D. in the Bom.Suburban Dist District, had taken water connection for his bungalow in the l locality known as Golibar at Santa Cruz on 5-1-1936. One Mr Ahmedali Noorbhai was residing in the bungalow at that time, and as the water charges were not paid, the connection was cut off on 21-8-1937. The connection was again taken on 26-1-1938. It appears that Karimbhai fixed an unauthorised T tee to his private pipe line between the Govt. main and the meter and from the Tee he had fixed a bye-pass connection which was again joined to his private pipe line between the meter and the compound and thus obtained water supply by avoiding themeasurement of water by the meter. (vide sketch at p.17 ante) The matter was referred to the R.L.A. who advised that Mr. Karimbhai should be prosecuted for committing breach of rule 21(1) read with rule 25 of the Rules for the Supply of water by the P.W.D. and section 61(9) of the Bombay Irrigation Act, 1879 and also for an offence of theft under section 379 I.P.C. (vide R.L.A's opinion No.11613 d/- 7-11-1939). Karimbhai was accordingly charged for breach of rule 21(1) and also for theft of Govt. water under sectio 379 I.P.C. The City Magistrate, F.C., Bandra convicted the accused of offence under section 379 I.P.C. and also under section 61(9) of the Bom. Irrigation Act for breach of rule 21(1) and sentenced him to pay a fine of Rs.500/- or in default to suffer rigorous imprisonment for one month forthe former and a fine of Rs.50/- or in default R.I. for one week for the latter.

2. It appears that the accused preferred an appal to the sessions Judge, Thana, who set aside the conviction and acquitt the accused on theground that beyond mere suspicion no positiv evidence was led to prove that the accused was responsible for the unauthorised water connection. In his report No.1822d/- 10-9-42, the Asstt. P.P., Thana and E.S.D. informed the Ex. Engineer, Thana, that the accused as land-lord, was primarily responsible for payment of watercharges inspite of the fact that some one else was responsible for the unauthorised connection, andthat water charges could be recovered from the land-lord, Karimbhai, under section 57 of the Bom. Irrigation Act, 1879. It appearsthat as advised by the Asstt. P.P. the Ex. Engineer, Thana in his letter No.E.W.S./21205 d/-22-12-42 requested the Dist. Dy.Collector E.S.D. to arrange to recover the sum of Rs.2682-5-0 being the arrear of water charges as arrear of land revenue.

3. The P.W.D. office relies upon the R.L.A's opinions Nos. 9463 d/-3-11-41 and 3627 d/-29-4-42 and holds that in view of the legal positon stated in these opinions, the water dues cannot be recovered as arrears of land revenue, and that the only course feasible for recovery of the arrear is to cut off the water supply and thn to reconnect the same on payment of the arrears. The R.L.A. isrequested to advise whether the view expressed by the P.W.D. is correct.

4. In Para. 4 of the P.W.D. office note d/-4-2-43, it is stated that the late Development Directorate issued the rules under section 70 of the Bom. Irrigation Act, 1879, which was not proper. Govt. purchases water in bulk from the Bom. Munid pali [illegible] and distributes it in the Salsette and Trombay areas. It is

clear that since the sour ce of water supply vest in the Bom. Municipality by virtues of provision of section 71 of the Bom. Irrigation Act, the Act will have no application to such lakes an therefore, Govt. cannot frame rules under section 70 prescribing the amounts of charges to be paid by persons for the water supplied to them, or for any other matter. Govt. may make non-statutory statutory rules for the purpose (see R.L.A.'s No.9453 d/- 3-11-41) As stated in R.L.A's No.3627 d/- 28-4-42, such rules cannot create a charge on an, property, nor can they provide for recovery of the amount as arrears of land revenue. The old rules of 1923 have been superseded by new non-statutory rules issued under notification No.7002/36 d/- 6-11-42. For the reasons stated in para 4 of P.W.D. office note p.c. ante the only feasible course would be cut off the connection and/or file a suit against Mr. Kanjibhai for recovery of water charges.

Sd/- E.P.KHAMBATA.

S.A.S.

I agree. Reply may be A-A of Mr. Khambata's note

Sd/- R.T.K.

A.L.N.

I do not know whether there is any prospect of a civil suit succeeding in this case. The point has not been consid ed. I therefore suggest that "The legal position is correc ly stated in Para 4 of the P.W.D. office Note dated 4-2-43. If cutting off the supply of water does not yield results, the question whether civil suit would lie may be considered."

Sd/- R.S.N.
11/3

Office of the R.L.A.

For the reasons stated in para.4 of P.W.D. office note at p. 68 ante, the only feasible course would be to cut off the connection and/or file a suit against Mr. Karimbhai for recovery of water charges.

Sd/- P.N.M.
23/3.

Remembrancer of Legal Affairs.

U.R.to P.W.D., No. 2119, dated the 24th March 1943.

RHD.
7.7.

Office of the R.L.A.

No attempt has been made to give any details of the practical difficulties which have given rise to the points discussed in the Superintending Engineer's letter dated 6th March. For a clear understanding of the points involved it is necessary in most cases that the practical difficulties which have arisen should be carefully stated and the R.L.A. given the benefit, if necessary, of any special knowledge that may be at the disposal of the administrative department concerned. Further the R.L.A. as a rule is reluctant to consider, unless necessity appears, theoretical difficulties which arise not in practice but only in speculations often officer or in the course of conferences. Hypothetical questions to which such difficulties give rise are often diffcult both to understand and answer. And when there is practical difficulty the R.L.A. welcomes a careful statemen ofthedetails not only because a fuller understanding of the questions referred is facilitated thereby but also he has the opportunity of seeing whether the questions do indeed arise from the facts.

2. In the present case the main question appears to be whether a sanctioned application for water is an agreement forthe purpose of section 30 of the Bombay Irrigation Act, 1897. On that point two former opinions of the R.L.A. are relevant i.e. U.R. to R.D.No.1685 dated 20th May 1927 and U.R. to P.W.D.No.2166 dated 5th July 1927. (A copy of, the former opinion isenclosed). The second opinion ismor to the point. It appears that a sanctioned application is an agreement for the purposes of section 30 although it must be admitted that the term "agreement" in section 30

is not very exact. Another question is whether the term "transfer" in section 30 includes a lease or a sub-lease. In its strict legal sense transfermeans not only a transfer by way of sale but also by way of lease, sub-lease or mortgage. (see the notes under section 5 of the Transfer of Property Act, 1882 in Mitra's 9th Edition). I know ofno reason why theterm "transfer" in section 30 should not be taken to include a lease or sub-lease. That seems to be sufficient to meet the superintending Engineer's difficulties.

Id/- P.N.M.
14/5
Remembrancer of Legal Affairs.

U.R. to P.W.D. No.3553, dated 15th May 1943.

RHB.
7.7.

Office of the R.L.A.

In 1900, when distress was acute in Gujrat the constructio of a tank was begun at Muvalia two miles to the South-West of Dohad town on the Dadhumati river, in order to store water for supply to Dohad town and also for irrigation. Before that date there was no bund or dam on the river. Lift irrigation was in vogue but the area irrigated by this method is not known. The project to supply water to Dohad fell through. Right and left bank cannals were added to t the tank and the final intention was that it should be used only for the purpose of irrigation. At present the dam irrigates approximately 761 acres. Apparently this does not use to the full the water in the dam. It is now proposed for the second time that the dam should supply Dohad with water and the balance of the water be used for irrigation. The P.W.D. opines that the tank is a canal within the meaning of section 3 of the Bombay Irrigation Act, 1879; but it has not been notified either under secti 15 or sec. 73 of that Act. The tank isbeingmaintained as minor irrigation work in charge of the P.W.D. It iswater that is given to the irrigators from year to year on application under section27 of the Irrigation Act. No agreement with the irrigators has been executed under section 30. There seems to be a difference of opinion in the papers regarding the extent to which the arrangement between Government and Dohad Municipality for the supply of town water will affect the amount of water available for the irrigators. Clause 10 of the draft agreement provides that Government after serving about 500 Cft. of water upt R.L. 124.25 in the tank on 1st June of the second year for

supply to Dohad Municipality will be entitled to make use of the surplus water for any purpose which they may deem fit so that the existing irrigation on the left bank canal shall not be prejudiced. Clause 11 then provides that if in the opinion of Government the irrigation inter sts are prejudiced except as provided in clause 10 above the Municipality shall be liable to pay componsatiam to the persons concerned as may be determined by Government. The Municipality objects to this clause and wants it to be deleted. The R.L.A. is asked to give his opinion on this clause.

2. The main objection to the clause is that it does not make clear what measure of liability for compensation for damage to irrigation right the Municipality is to undertake and what measures of liability Government is to undertake. The reference in clause 11 to the provisions of preceding clause adds to the confusion. Claims against Government may arise in two ways. The irrigation may have a legal rights enforceable in a court of law. Secondly ifthe amount of water made available for irrigation is reduced the irrigators may have a grievance which while not yielding any relief in court may lead to agitation which Government may find it difficult to resists. It may well be that in some years at least the area of land irrigated will be considerably reduced and Government may think that the irrigators deserve compensation in one way or another. It is not clear whether the Municipality is to be liable for this type of compensation. Nor is it clear in the case of an irrigator who has a legal right to compensation whether the leagl right must be enforced in court before the Municipality becomes liable. E.G. ifGovernment came to the conclusion that an irrigator had legal rights hich entitled him to compensation and

Government was unwilling to put him to the expense of suit, would the Municipality be liable in these circumstances?

3. Regarding the second type of compensation which may be termed non-legal compensation itis for Government to decide whether it is likely to be a factor in thefuture history of this tank and whether the Municipality should be asked to undertake that liability. The question of the irrigators' legal rights to compensation is more complicated. There are first those whohad water rights before the construction of the tank. The class may befurther divided into riparian irrigators and non-riparian irrigators. It is not known how the construction of the dam affected these rights. If it interrupted the exercise ofthese rights, the irrigators concerned may have lost their rights. But it is more likely that the rights of most of these people continued in one form or another. If these rights are by way of easement or immemorial user they can be maintained in a court of law. If the distribution of water contemplated in the proposed agreement with the Municipality injures these rights the person concerned would be entitled to damages and an injunction regarding the future distribution of the water. The R.L.A. does not know whether there is here a fertile source of irrigation or not. The R.L.A. does not know what arrangement was arrived at between the P.W.D. and the riparian owners on the lower reaches of the Dadhumati river to ensure to the latter their customary supply of water on t theconstruction of the Muvalia tank. The rights of these owners may suffer by reason of the Agreement with the Municipality.

4. The second class of irrigators are those whose lands wer

watered for the first time by the construction of the tank. There is no question of those irrigators acquiring rights by way of easement. They obtained the water, not adversely to Government, but by application to Government under section 27 of the Irrigation Act. There is no agreement with those irrigators under section 30 ofthe Irrigation Act. Legally Government any year may stop supplying water to those irrigators. Therefore Govt. is not legally bound to compensate those irrigators although on other grounds Government might in future think it advisable. For example proprietors of lands irrigated from the Muvalia tank would also be adversely affected if their annual supply falls short of the supply which they have been getting year after year since 1900 for irrgating valuable orchard or sugarcane lands in which considerable capital is invested. Although these proprietors would not have any prescriptive or customary rights to fall back upon and would normally be at the mercy of Government for their water supply, they would nevertheless have a legitimate grievance for which in equity, if not in law, they would be entitled to some compensation.

Sd/- P.M.N.
9/8.
Remembrancer of Legal Affairs.

U.R. to P.W.D.No. 5437, dt. 10-8-43.

RHB.
7.7.

Office of the R.L.A.

The first question raised for the consideration of the R.L.A. is whether the riparian owners in Phaltan State have a right to the water brought into the Nira River by the nalas running through the state area.

2. This question was fully considered by R.L.A. in his opinion No.9499, dated 4th November 1941. It is true that subsequent to that opinion of the R.L.A. Government has issued a notification under section 5 of the Bombay Irrigation Act, 1879, declaring that the water of the Nira River and its tributaries from below the weir at Vir to the point where it joins the Bhima river near Sangam Village in the Sholapur District and that notification covers the part of the river in the limits of the Phaltan State; but the Bombay Irrigation Act having no application to the Phaltan State limits is concerned. Consequently the notification issued under section 5 does not make any difference and the view expressed by the R.L.A. in his opinion No.9499 dated 4th November 1941 still holds good. The riparian owners of land in the Phaltan State would be entitled to use the river water subject to the limitations stated in that opinion.

the notification issued under section 5 is ineffective in so far as its application to the river in the Phaltan state

3. The second question for consideration is whether the Bombay Government would be entitled to levy water rate for the use of water by the riparian owners in the Phaltan Stat Since these riparian owners have a right to use the river water and since the notification issued by Bombay Governmen under section 5 of the Bombay Irrigation Act has no application, the Bombay Government can have no right to levy water rate from the riparian owners in the Phaltan

State for the use of the river water.

4. The above assumes that the State project is to grant pumping rights merely to riparian irrigators i.e. to those irrigators whose land borders the Nira river. The Durbar nowhere explicitly so limits its projects. It may well bethat the Durbar is seeking to obtain the right to irrgate not merely riparian lands but also lands at some distance from the river. The Durbar has nowhere stated how much water it intends to allow to be withdrawn from the river or what area is to b e irrigated. It may be that the Phaltan State proposes to irrigate a large area for thecultivation of sugarcane. In the case of the Bhor State the Bombay Government has objected to a sbheme of pumping and has said that it is willing to submit the matter to arbitration. If the Phaltan State proposes to irrigate more than the riparian lands it would seem desirable to deal with this proposal on the same footing as the Bhor State proposal. (see R.L.A's U.R. to P.W.D. No.4860 dated 12th June 1942). The question would then be whether the Phaltan State has a right to insert into an already established system of irrigation a scheme for large scale pumping. The objections to such a scheme obviously would not be met by saying as the Dewan's letter at page 77 says that the Bombay Govrnment has the right to insert another such scheme on theother bank. It seems desirable to obtain some more definite information from the Phaltan Durbar before admitting that the Phaltan State has any right to pump water.

Id/- P.N.M.

19/11.

U.R.to P.W.D., No.8600, dated 20th November 1943.

Office of the R.L.A.

At page 37 of the file the Superintending Engineer says that that Mr. Gadgil is contending that the words "whenever available" in clause 3(2) of the lease apply only to "effluent" and not to "canal water". In my opinion, there is no force in that contention. However, Mr. Gadgil has nowhere put this contention on paper. So far as his side of the correspondence shows, his contention is something different. In the two points which he has specifically asked to be submitted to the Adviser, see page 65, he seems to admit that the words "whenever available" are to be taken with both "water" and "effluent". There is contention is that he has a preferential right to the supply both of canal water and effluent.

"Whenever the lessee Mr. Gadgil, a tenant of large area of 122 acres 4 gunthas and 4 annas of Government lands (more than ½ acreage) in the Manjri Drainage area, has any preferential right to supply of canal water and effluent to these irrigated lands for his agricultural operations, at least to the extent of the compulsory 1/3 plantation of sugarcane, when water and effluent are available?"

The point hinges upon themeaning to be given to the words "whenever available" in clause 3(2) of the lease. In the context it is not clear what they mean. Do they give an absolute discretion to the Executive Engineer to refuse water, or do they imply that there must be a reasonable and fair distribution of water and effluent between all parties concerned? A distribution that made a sudden departure from the practice of former years and frustrated the reasonable hopes of a lessee might well afford legal relief.

The P.W.D. notes distinguish what are called "moral considerations" from "legal consideration." It is not so clear that the two types of considerations are distinct in this case. Another consideration is that the lessee is under an obligation to cultivate a certain area with sugarcane, no doubt if he does not obtain the water he will not be liable to any penalty for failure to cultivate, and no doubt a shortage of water from natural causes would exempt Government from any obligation to supply water even for that compulsory area. But is is no certain whether Government, with the usual amount of water and effluent at its disposal, is able to refuse to give the leasee any water at all. Much would depend on the reasons why Govt. think it necessary to refuse water and effluent. These reasons are not clearly stated in the present papers. However, the matter is one for arbitration under clause 5 of the lease, and Mr. Gadgil has a legal right to have an arbitrator or arbitrators appointed.

Id/- P.N.M.
21/12

Remembrancer of Legal Affairs.

U.R. to P.W.D., No.396 Confl., dated 22nd December 1943.

RHB.
7.7.